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No. 87-239

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1987

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JAMES MOYE, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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Petitioner contends that the government improperly refused to produce two debriefing statements of a government informant.

1. Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of distributing heroin and possessing heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 10 years' imprisonment. The court of appeals affirmed in an unpublished opinion (Pet. App. 1a-4a).[1]

The evidence at trial revealed that on April 29, 1985, Tanita Greene, a private citizen who was cooperating with the government as a confidential informant, introduced Denise Moye to a DEA undercover agent, Everett Hatcher. Hatcher indicated to Denise that he wanted to buy some heroin. Denise responded that petitioner, her brother, was out of heroin but that he would receive a new

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[1] Two of petitioner's siblings were also charged in the case. Petitioner's sister, Denise Moye, pleaded guilty to various drug offenses. The charge against petitioner's brother, Rubin Moye, was dismissed by the district court at the close of the government's case.

supply in a couple of days. In the interim, Denise supplied Hatcher with heroin from another source. Hatcher paid $1,850 for that heroin. Tr. 72-77, 105-111.

On May 8, 1985, Hatcher and Greene again met with Denise. Denise entered Hatcher's car and the two negotiated another sale of heroin. Denise told Hatcher that this time he would be getting "our dope." When Hatcher asked her what she meant, she pointed to petitioner, who was standing nearby, and said, "me and my brother James." Tr. 115-122.

Denise then left Hatcher's car. She walked directly to petitioner and had a conversation with him. Moments later, she reentered the car and told Hatcher to leave the area because the "heat" was around. Hatcher parked the car a few blocks away, where he gave Denise $3,500. At Denise's direction, Hatcher then drove back to the original area, and the two of them engaged in conversation for several minutes. Denise described the Moye heroin operation, stating that "nothing happens" in the area near 118th Street and Manhattan Avenue without her brothers' knowledge, that their customers included people from other states, and that she personally sold approximately 500 quarter bags of heroin per day. While Denise and Hatcher were talking, Hatcher saw petitioner meeting with his "spotters"—several teenagers who were on foot or bicycles checking the area for police officers. Tr. 123-125, 127-132, 136-137.

Denise eventually left the car and met with petitioner on the corner. Greene joined them, and the three then walked around the corner out of Hatcher's view. A few minutes later Denise and Greene reentered the car. Denise told Hatcher to drive to another corner, where she handed him a package containing 100 glassine envelopes of heroin. Tr. 140-143, 241.

In addition to the evidence of petitioner's participation in the sale on May 8, 1985, the government introduced several tape-recorded telephone conversations in which Denise repeatedly referred to the heroin distribution ring that she and her brothers operated. The government also introduced evidence seized during a search of petitioner's home, including traces of heroin and narcotics paraphernalia. See U.S. C.A. Br. 8-9.

2. At trial, the government objected to confirming Greene's identity as the confidential informant because of concern about her safety. Nevertheless, petitioner concedes that he was aware of the identity of the government's informant (Pet. 7); indeed, Hatcher repeatedly referred to Greene by name during his testimony (*e.g.*, Tr. 203, 213-215, 223-224).

During the cross-examination of Hatcher, the defense requested the production of two debriefing statements given by Greene to another government agent (who was not a witness at trial) (Tr. 307). Although the district court denied the request (*ibid.*), the government voluntarily provided the court with copies of the statements for it to review in camera (Tr. 419-420). After reviewing the statements, the court concluded that they were not discoverable. The court noted that its reading of the statements did not reveal any *Brady* material and that the statements were "[e]ssentially * * * similar to the testimony which has been presented here." Pet. App. 5a.

3. On appeal, petitioner argued, inter alia, that the government improperly refused to disclose the name, whereabouts, and debriefing statements of its informant. The court held (Pet. App. 2a) that the district court did not abuse its discretion in refusing to require the government to confirm the informant's identity. It further held (*ibid.*) that since the district court reviewed the debriefing statements and found that they did not contain any *Brady*

material, the district court did not abuse its discretion in refusing to provide the statements to petitioner.

4. Petitioner claims that the district court erred when it failed to turn over Greene's debriefing statements. His principal argument (Pet. 7) is that since he knew the identity of the informant by the time of trial, the statements were no longer privileged and were therefore discoverable. That argument lacks merit for the simple reason that there is no legal basis upon which the government was required to produce the statements. Neither Greene nor the agent who took the statements testified at trial, so the statements were not discoverable under Fed. R. Crim. P. 26.2 or the Jencks Act, 18 U.S.C. 3500. Similarly, the statements were not discoverable under Fed. R. Crim. P. 16. And since they contained no exculpatory material, the statements were not subject to production under the principles of *Brady* v. *Maryland*, 373 U.S. 83 (1963).[2]

Petitioner also contends (Pet. 8-10) that under *Brady*, the district court should have simply disclosed the debriefing statements to the defense instead of evaluating them in camera and making its own judgment as to whether they contained exculpatory material. That claim likewise lacks merit; the court's review of the documents in camera was an entirely proper procedure. See, *e.g.*, *Pennsylvania* v. *Ritchie*, No. 85-1347 (Feb. 24, 1987), slip op. 17-19; *United States* v. *Cadet*, 727 F.2d 1453, 1467-1468 (9th Cir. 1984); *Kett* v. *United States*, 722 F.2d 687, 689 (11th Cir.

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[2] Petitioner erroneously claims (Pet. 8) that the statements were discoverable under Fed. R. Evid. 806. That Rule simply entitles an opponent to attack the credibility of a hearsay declarant to the same extent as if the declarant had testified; it does not require the production of documents or other materials that are not otherwise discoverable. Petitioner further errs in arguing (Pet. 7-8) that the court of appeals' decision conflicts with *Hodgson* v. *Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303 (5th Cir. 1972), and *Mitchell* v. *Bass*, 252 F.2d 513 (8th Cir. 1958). Those cases involve discovery obligations in civil cases and are therefore wholly inapposite.

1984); *United States* v. *Kramer*, 711 F.2d 789, 797-798 (7th Cir.), cert. denied, 464 U.S. 962 (1983). Petitioner cites no authority suggesting otherwise.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
*Solicitor General*

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